

SERVED: December 31, 2007

NTSB Order No. EA-5348

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 27<sup>th</sup> day of December, 2007

_____	)	
ROBERT A. STURGELL,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-17863
v.	)	
	)	
ALLEN WAYNE LACKEY,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent appeals the written decisional order, and order denying reconsideration, of Administrative Law Judge Patrick G. Geraghty, issued February 1, 2007, and February 13, 2007, respectively.<sup>1</sup> By those decisions, the law judge granted the Administrator's motion for summary judgment and denied

<sup>1</sup> A copy of the orders is attached.

respondent's motion for reconsideration of the decisional order, based on violations of 14 C.F.R. §§ 135.293(a)<sup>2</sup> and (b),<sup>3</sup> 135.299(a),<sup>4</sup> and 91.13(a).<sup>5</sup> The law judge ordered a 110-day suspension of respondent's commercial pilot certificate. We deny respondent's appeal.

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<sup>2</sup> Section 135.293(a) states that, "[n]o certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot," regarding the pilot's knowledge of several subjects, such as the type of aircraft, air traffic control procedures, meteorology, and the like.

<sup>3</sup> The pertinent portion of section 135.293(b) provides as follows:

No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft.

<sup>4</sup> Section 135.299(a) states that, "[n]o certificate holder may use a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly." Section 135.299(a) specifies that an approved check pilot participate in the flight check, that the flight check consist of at least one flight over one route segment, and that the flight check include takeoffs and landings at one or more representative airports.

<sup>5</sup> Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

The Administrator issued the suspension order, which became the complaint in this case, on October 6, 2006. The complaint alleged that respondent operated a Bell helicopter as pilot-in-command (PIC) on five passenger-carrying flights during July 2005, on behalf of his corporation, Wine Country Helicopters. The Administrator's complaint stated that for each of the five flights, respondent neither met the requisite pilot testing requirements, nor fulfilled the competency and flight checks that §§ 135.293 and 135.299 require. The complaint also alleged that respondent's conduct was careless and reckless, and therefore resulted in a violation of § 91.13(a). The complaint ordered a suspension period of 150 days.

Respondent provided a timely answer to the complaint, in which he admitted each of the relevant factual allegations, but denied that his conduct was careless or reckless. Respondent's answer also articulated an affirmative defense in an attempt to justify his conduct. Specifically, respondent alleged that he contacted the Sacramento Flight Standards District Office (FSDO) on numerous occasions to schedule the necessary check rides, but that the FSDO did not respond for almost 2 months; when the FSDO finally contacted respondent, the FSDO and respondent scheduled check rides for August 1, 2005. Respondent's answer also alleged that the FAA Western Pacific Region instructed the Sacramento FSDO to refrain from discussions with respondent, due

to the assertions of respondent's influential former business partner, with whom respondent was engaged in litigation regarding Wine Country Helicopters.

Based on respondent's admissions in his answer to all the factual allegations in the Administrator's complaint, the Administrator filed a motion for summary judgment pursuant to 49 C.F.R. § 821.17(d). The Administrator's motion asserted that no genuine issues of material fact existed, because respondent did not deny the Administrator's factual allegations, and that the law judge should issue an order affirming the Administrator's complaint. The Administrator's motion further alleged that a finding that respondent also violated § 91.13(a), because his conduct was careless and reckless, was appropriate. Finally, the Administrator's motion asserted that the sanction that the Administrator imposed was appropriate under the FAA Sanction Guidance Table and was entitled to deference.

In his response to the Administrator's motion, respondent asserted the additional affirmative defense that he had mistakenly miscalculated the deadline for his check ride. In addition, respondent asserted that the existence of four factual issues precluded disposition of the case via summary judgment: (1) whether the Sacramento FSDO refused to respond to him; (2) whether the FSDO's failure to respond resulted from instructions from the FAA Western Pacific Region; (3) whether respondent's

failure to complete the check rides by the deadline was careless or reckless; and (4) whether the suspension period of 150 days was appropriate. After considering the motion and the response, the law judge granted the Administrator's motion, but reduced the sanction period from 150 days to 110 days, based on respondent's assertions that he had inadvertently missed the deadline for the check rides, and that respondent had "made efforts to contact [the FAA] and schedule [the check rides]." Decisional Order at 5.

Subsequent to the law judge's decision, respondent filed a motion seeking the law judge's reconsideration. Respondent's motion argued that he did not have an opportunity to present arguments on whether the sanction was appropriate. The law judge denied this motion, based on the fact that respondent had the opportunity to present an argument on sanction in his response to the Administrator's motion for summary judgment, but did not do so.

Respondent now appeals both the law judge's decision concerning the granting of summary judgment, as well as the law judge's denial of his subsequent motion seeking reconsideration of the sanction issue. In support of his appeal, respondent asserts that the Administrator did not provide sufficient factual evidence in support of the allegations, that summary judgment on the issue of sanction was inappropriate, and that

respondent had presented three affirmative defenses that justify his conduct. Respondent therefore asserts that disposition of this case via summary judgment is improper. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.<sup>6</sup>

Under the Board's Rules of Practice, a party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no factual issues exist, and that the party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of Civil Procedure to be instructive in determining whether disposition of a case via summary judgment is appropriate. Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)). In this regard, we recognize that Federal courts have granted summary judgment when no genuine issues of material fact exist. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).<sup>7</sup> In submitting a motion for summary judgment, the burden rests on the moving party to establish that no factual issues exist. Moreover,

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<sup>6</sup> The Administrator does not contest the law judge's reduction in sanction.

<sup>7</sup> A *genuine* issue exists if the evidence is sufficient for a reasonable fact-finder to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). An issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

courts will generally view a motion for summary judgment in a light most favorable to the nonmoving party when a genuine dispute regarding the facts exists. Fed. R. Civ. P. 56(c); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (stating that, "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'"); see also Administrator v. Englestead, NTSB Order No. EA-4663 at 2 (1998).

In the case at issue, respondent admitted to all factual allegations in the Administrator's complaint, which included assertions that respondent operated an aircraft on behalf of Wine Country Helicopters, without having first passed the requisite competency and flight checks, and without having met the recurrent pilot testing requirements. Under 14 C.F.R. §§ 135.293(a) and (b) and 135.299, an airman may not operate an aircraft in the absence of completing competency and flight checks, and testing requirements. Here, respondent has admitted that he operated the aircraft in the absence of fulfilling these requirements. While respondent alleges that the Administrator prevented him from scheduling his flight checks, such an excuse does not explain or justify respondent's subsequent operation of the aircraft. Therefore, the affirmative defense that respondent asserts does not justify his operation of the

aircraft without having completed the requisite flight checks and testing obligations. In addition, we note that, if a FSDO refuses to schedule a necessary flight check, an airman must seek relief against the Administrator independently of the Board. Our enabling statute specifies that the Board may only review the denial, amendment, modification, suspension, or revocation of a certificate; given this limited jurisdiction, we do not have the authority to force the Administrator to take certain actions. See 49 U.S.C. § 1133.

Given that respondent has admitted that he operated an aircraft while out of compliance with 14 C.F.R. §§ 135.293(a) and (b) and 135.299, we find that respondent has violated these sections of the Federal Aviation Regulations, as well as 14 C.F.R. § 91.13(a), and we affirm the law judge's decision.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's decision, including the reduction in sanction from 150 to 110 days, is affirmed; and
3. The 110-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>8</sup>

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<sup>8</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).



ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.